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ALEXANDER L. STEVAS

NO. 82-1915

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

STATE OF CALIFORNIA,

Petitioner,

v.

VINCENT HARVIER, as Chairman of Quechan Tribal Council, et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents are dissatisfied with petitioner's statement of the first question presented for review: the issue of the sovereign immunity of Indian tribal officials. That issue was expressly not reached or decided by the Court of Appeals, and there is no decision on that issue to review. See Decision, Appendix A to Petition for Certiorari (hereafter "Pet. for Cert.") at A-6, A-7, and n. 1 at A-7, A-8; see also Pet. for Cert. at 6-7. By strictly limiting the scope of its decision, and declining to address the sovereign immunity question, the Court of Appeals narrowed the scope of appeal to the sole procedural question of the correctness of its determination that no appealable order was issued by the trial court. That, and that alone, is the only reviewable issue in this case.

The first question presented by Petitioner is thus irrelevant to the Ninth Circuit decision. While the question may be important and interesting, it is simply not properly before this Court, since

there is no sovereign immunity decision that is subject to review.

Respondent would also frame the second question presented in more specific terms, as opposed to petitioner's broader formulation: whether an order dimissing a complaint, but not the underlying action, is a final and appealable decision under 28 U.S.C. § 1291, where the plaintiff has not attempted to cure the pleading defect that led to the dismissal although he had an opportunity to do so.

PARTIES TO THE CASE

Pursuant to Federal Rule of Appellate Procedure 43(c)(1), successors in office to public officials are automatically substituted as parties. Thus, the correct names of the respondents, as of this date, are Vincent Harvier, President of the Quechan Indian Tribe; Phyllis Valenzuela, Joe Jackson, John Norton, Greg Yuma, and William Thomas, Tribal Council Members; and Neil Hill, Fish & Game Warden.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE CASE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT AGAINST GRANTING THE WRIT	
I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR DETERMINING SWEEPING QUESTIONS OF INDIAN LAW	7
A. There Is No Sovereign Immunity Decision To Review	7
B. Subsequent Events And Cases Have Effectively Vitiated Any Live Controversy	11
II. CALIFORNIA'S CLAIMED RELIANCE ON CONSTITUTIONAL VIOLATIONS BY TRIBAL OFFICERS IGNORES ITS OWN PREVIOUS DISCLAIMER	14
III. PETITIONER MISAPPREHENDS THE NATURE OF SUITS AGAINST OFFICERS IN THEIR INDIVIDUAL CAPACITIES	16
A. Petitioner's Suit Survives Changes of Tribal Officers	18

B. California Fails To Articulate Any Reasonable Explanation Or Justification For Its Stubborn Failure To Follow Basic Pleading Rules 21

IV. CALIFORNIA'S OBJECTIONS TO THE APPLICATION OF THE FINAL JUDGMENT RULE ARE INSUBSTANTIAL BECAUSE OF ITS CLEAR OPPORTUNITY TO AMEND ITS COMPLAINT 26

A. The Final Judgment Rule Being Entirely Jurisdictional Cannot Be Applied With Reference To Its Effects On Individual Litigants 26

B. There Is Little Or No True Conflict Between The Courts Of Appeal 29

C. The Court Of Appeals Was Not Bound By The Earlier Motions Panel Ruling 33

V. TRIBAL SOVEREIGN IMMUNITY IS STILL VITAL TO THE PROPER FUNCTIONING OF INDIAN TRIBAL GOVERNMENTS 35

CONCLUSION 39

APPENDIX A-1

TABLE OF AUTHORITIES

Cases

American Surety Co. v. Baldwin,
287 U.S. 156 (1932) 23

Austracan, (U.S.A.) Inc. v.
M/V Lemoncore,
500 F.2d 237 (5th Cir. 1974) 30

Azar v. Conley,
480 F.2d 220 (6th Cir. 1973) 30,31

Boeing Co. v. Van Gemert,
444 U.S. 478 (1980) 7,8

Borelli v. City of Reading,.
532 F.2d 950 (3d Cir. 1976) 30

Brooks v. United States,
337 U.S. 49 (1949) 7

Brown Shoe Company v. United States
370 U.S. 294 (1962) 33,34

Catlin v. United States,
324 U.S. 229 (1945) 26

Cobbledick v. United States,
309 U.S. 323 (1940) 27

County of Los Angeles v. Davis,
440 U.S. 625 (1979) 11

Elfenbein v. Gulf & Western
Industries, Inc.
590 F.2d 445 (2d Cir. 1978) 31

Ex parte Young
209 U.S. 123 (1908) passim

Forgay v. Conrad,
47 U.S. (16 How.) 200 (1848) 27

Franks v. Bowman Transportation Co.,
424 U.S. 747 (1976) 11

Goldstein v. Cox,
396 U.S. 471 (1970) 23

Grantham v. McGraw Edison Co.,
444 F.2d 210 (7th Cir. 1971) 30

Green v. Department of Commerce,
618 F.2d 836 (D.C.Cir. 1980) 33,34

Jung v. K & D Mining Co.,
356 U.S. 335 (1958) 30

Local 179, United Textile Workers
v. Federal Paper Stock Co.,
461 F.2d 849 (8th Cir. 1972) 30

Marshall v. Sawyer,
301 F.2d 639 (9th Cir. 1962) 27

Merrion v. Jicarilla Apache Tribe,
455 U.S. 130 (1982) 12

Missouri & K.I.R. Co. v. Olathe,
22 U.S. 185 (1911) 30

Montana v. United States,
450 U.S. 544 (1981) 11,12

New Mexico v. Mescalero Apache Tribe,
__U.S.__, 51 U.S.L.W. 4741 (1983) 6,11,12

O'Shea v. Littleton,
414 U.S. 488 (1974) 13

Owens v. Union Pacific R. Co.,
319 U.S. 715 (1943) 7

People v. Quechan Tribe,
595 F.2d 1153 (9th Cir. 1979) 2,11,23

Perez v. Ledesma,
401 U.S. 82 (1971) 17

Radio Station WOW, Inc. v. Johnson,
326 U.S. 120 (1945) 23

Republic Natural Gas Co. v.
State of Oklahoma,
334 U.S. 62 (1948) 28

Richardson v. United States,
336 F.2d 265 (9th Cir. 1964) 31,32

Rizzo v. Goode,
423 U.S. 362 (1976) 37

Russell v. Commissioner,
678 F.2d 782 (9th Cir. 1982) 34

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978) 36

Sherr v. Sierra Trading Corp.,
492 F.2d 971 (10th Cir. 1974) 31

State of Wisconsin v. Baker,
698 F.2d 1323 (7th Cir. 1983) 11

Sturdevant v. Deer,
73 F.R.D. 375 (1976) 18

Thebo v. Choctaw Tribe,
66 F. 372 (8th Cir. 1895) 38

United States v. Anderson,
464 F.2d 1390 (D.C.Cir. 1972) 26,27

United States v. Fleischman,
339 U.S. 349 (1950) 7

United States v. Imperial Irrigation District,
559 F.2d 509 (9th Cir. 1977) 34

Statutes & Rules

28 U.S.C. § 1291 ii,26,34

Fed.R.Civ.Proc. 25(d)(1) 18,19, 20,21

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Fed.R.App.Proc. 10(e) 29

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Supreme Court Rule 40.3 18

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STATUTORY PROVISIONS INVOLVED

Since the only issues decided by the Court of Appeals were the finality of the district court's action and the Court of Appeals' jurisdiction, there is no tribal immunity issue properly before this Court. The respondents therefore disagree with the first paragraph of petitioner's statement of the applicable law.

STATEMENT OF THE CASE

Respondents object to the characterization of petitioner's complaint below as "following the familiar practice in sovereign immunity cases of suing the official rather that (sic) the sovereignty." Pet. for Cert. at 3; Brief of Amici Curiae at 5. The entire basis for the district court's dismissal was the state's failure and persistent refusal to follow the familiar practice of suing public officers as individuals under the method established by Ex parte Young, 209 U.S. 123 (1908). California insisted instead on suing the tribal officers in their official capacity as tribal officers, candidly and repeatedly stating that this action was

brought against the tribe itself, rather than against the defendants in their individual capacities. See, e.g., Brief of Appellant before the Ninth Circuit (hereafter "Cal.Br.") at 11. ("[O]ur action must ... be considered as an action against the Tribe"); see also Pet. for Cert. at A-7, n. 1.

Relying on the authority of People v. Quechan Tribe, 595 F.2d 1153 (9th Cir. 1979), the district court held that such an action directly against the Tribe, rather than an Ex parte Young action against officers as individuals, was barred. This was in no way a decision on the merits; the implication of the district court's order was that the complaint should and could be amended to attempt to state an Ex parte Young suit against the officers as individuals. Rather than doing so, the state appealed.

The repeated contention of the state and its amici that the district court ruled that the state "cannot obtain relief against the tribal officials that cannot be obtained directly against the

Tribe," Pet. for Cert. at 4, Amici Brief at 6, is factually incorrect, and seriously mischaracterizes the actual ruling. No such statement appears in either the Order dismissing the complaint or in the hearing transcript, nor is it even implied; petitioner has created it out of whole cloth. In addition, the district court never ruled that "California was improperly 'trying to come in the back door' by suing tribal officials for relief which could not be obtained directly against the tribe," Pet. for Cert. at 4, n. 3. An examination of the cited page 11 of the Transcript reveals that the district court was simply making an observation about a supposed habit of the Court of Appeals, and no reference to any "improper attempt" by California appears. In fact, it may more fairly be read as an invitation to the state to accomplish indirectly what it was not allowed to do directly.

The Court of Appeals held that, since California could have been reasonably expected to amend its complaint to state a cause of action against the tribal officers in their individual

capacities, there was not an appealable order. It dismissed the state's appeal for lack of jurisdiction, expressly declining to reach the underlying immunity issues. Pet. for Cert., A-5 through A-8. The opinion noted that California had repeatedly refused to proceed on an Ex parte Young theory, and had disclaimed any unconstitutional actions by tribal officials. Id. at n. 1. Despite the absence below of such allegations, those two factors furnished much of the basis for Judge Norris' dissent, in which he argued that such allegations should defeat tribal immunity claims. The majority opinion, while agreeing that the concept was "novel and interesting," held that it was irrelevant in this case, since that is not what California had alleged and pleaded, nor was it necessary to decide, given its ruling on the procedural issue. Id. at A-6, A-7.

California's characterization of the majority and dissenting opinions, and its assertions as to their intent and effect, are more properly argument, and will be dealt with accordingly below.

To the extent that petitioner's statement of the case goes beyond the "facts material to the consideration of the question presented," Rule 21(g), respondents respectfully note their dissatisfaction with petitioner's presentation; nonetheless, the facts and chronology are essentially correct.

SUMMARY OF ARGUMENT

The Ninth Circuit ruled on only one question: the finality and and appealability of the district court's order. Nothing else was decided, and nothing else is subject to review before this Court; there is quite simply no sovereign immunity decision to review. California's attempt to transform this narrow decision into a broad review of the tribal sovereign immunity doctrine must fail, since the State in essence appeals a nonexistent decision.

California has attempted, throughout this litigation, to create a test case on sovereign immunity rather than addressing the merits of the underlying hunting and fishing dispute alleged in its complaint. That dispute, if it ever truly existed, has been mooted or at least largely vitiated by

the passage of time, changes in tribal administration, and subsequent cases, particularly this Court's recent decision in New Mexico v. Mescalero Apache Tribe, ___U.S.___, 51 U.S.L.W. 4741 (June 13, 1983).

The Ninth Circuit's ruling on the procedural question was correct. Because of its eagerness to appeal the immunity issue, California did not attempt to amend its complaint to state an Ex parte Young cause of action against the Tribal officers in their individual capacities, insisting repeatedly that its cause of action was against the Tribe itself. The fact that the trial court had held open the possibility of thus amending the complaint, by dismissing only the complaint and not the action itself, coupled with California's failure to request or obtain a final judgment regardless, left the case in a fragmented, preliminary posture wholly inappropriate for appellate review. Since there is no decision on sovereign immunity to review, and since the procedural issue was correctly decided, the petition should be denied.

ARGUMENT AGAINST GRANTING THE WRIT

I. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR DETERMINING SWEEPING QUESTIONS OF INDIAN LAW

A. There Is No Ninth Circuit Sovereign Immunity Decision To Review

As this Court has repeatedly pointed out, its role is limited and curtailed by Constitutional and statutory parameters, as well as its own policies. Generally, contentions and arguments that were not ruled upon by the Court of Appeals are deemed inappropriate for review. United States v. Fleischman, 339 U.S. 349, 365 (1950); Owens v. Union Pacific R. Co., 319 U.S. 715, 725 (1943); Stern & Gressman, Supreme Court Practice, § 2.7 (4th ed. 1969) ("issues decided by a court of appeals may be reviewed") (emphasis added). Thus, this Court has declared itself "in no position to pass upon" questions not resolved by lower courts, where such resolution "was unnecessary in the view they took of the case." Such a decision would be premature. Brooks v. United States, 377 U.S. 49, 54 (1949); see also Boeing Co. v. Van Gemert, 444 U.S. 472,

482 n. 8 (1980) [review limited to issues determined by Court of Appeals].

The Ninth Circuit took special pains to point out that, under its view of the case, the various sovereign immunity arguments were irrelevant to its decision, and thus were neither considered nor decided: "[I]t is simply not necessary to reach the [sovereign immunity] issues discussed in the dissent." Pet. for Cert. at A-7. Petitioner admits, as it must, the limited scope of that decision. Pet. for Cert. at 19-20. The Court of Appeals correctly observed that the undeveloped record in the trial court was "wholly inadequate" to reach the "important and complex issues of law" the state once again attempts to raise in this petition. Id. at A5-A6. Absent any decision on the immunity issues, there is simply no question concerning them pre-

sented for review.[1]

The state has candidly admitted in previous correspondence that it is not particularly troubled by the fish and game and "threat of arrest" issues it alleges as the basis for its action, but that instead its "primary objective and purpose for filing a motion with the Court of Appeals was to expedite the issue of California's right to sue tribal officers." Letter of E.C. Fullerton, Director, California Department of Fish and Game, to Tribe's Attorney, October 15, 1980, Appendix A to this Brief. While the letter was not made part of the record below, respondents request this Court to

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[1]Petitioner's unsupported assertions that the decision somehow "effectively extends the tribal immunity doctrine," Pet. for Cert. at 14, and that without Supreme Court review "the case is over for all practical purposes," Pet. for Cert. at 17, fly in the face of the express holding of the Court of Appeals: that the state must now plead its action properly and obtain a final resolution before its appeal will be heard. Far from closing the door on the case, the Ninth Circuit's ruling constitutes an open invitation to proceed to a resolution on the merits.

take judicial notice of it at this time pursuant to Federal Rule of Evidence 201. The absence of an adequate record below illustrates the dangers of attempting to try the case in the first instance at the appellate level, since many potentially relevant facts and writings will not be in the record. See, e.g., Pet. for Cert. at 12, n. 7.

The State's Petition for Certiorari makes it clear that it is still attempting to escalate a straightforward decision on a rather esoteric point of federal civil procedure into a landmark case on tribal sovereign immunity, despite the fact that the Court of Appeals expressly refused to reach or decide any immunity issues. Even Judge Norris' dissenting opinion recognizes that only through a different resolution of the procedural question could the Court of Appeals have reached the sovereign immunity issues. Id. at A-19. That procedural issue is the only proper subject for review; there is no court of appeals decision on tribal sovereign immunity.

B. Subsequent Events and Case Law Have Effectively Vitiated Any Live Controversy

Where interim changes or events have eradicated the effects of an alleged violation, no live controversy exists and further judicial proceedings are not justified. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979); Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). Since the time of the Tribal Council action complained of,[2] this Court and the Courts of Appeal have greatly clarified and settled many of the underlying issues of tribal rights to control non-Indian hunting and fishing on reservation land, the gravamen of the state's suit. See, e.g., Montana v. United States, 450 U.S. 544 (1981); New Mexico v. Mescalero Apache Tribe, ___U.S.___, 51 U.S.L.W. 4741 (June

[2]The actions complained of took place in 1976, and resulted in California bringing People v. Quechan Tribe, 595 F.2d 1153 (1979). Cal.Br., 2-3; Brief of Appellees before Ninth Circuit [hereafter "App.Br."] at 9, n. 3.

13, 1983); State of Wisconsin v. Baker, 698 F.2d 1323 (7th Cir. 1983). The Mescalero decision's holdings on the preemptive effect of tribal authority to regulate reservation non-Indian hunting and fishing, and the nullifying effect of allowing concurrent state jurisdiction, control many of the central issues in this case: California complains primarily of tribal jurisdictional assertions that have now been upheld by this Court. Id. at 51 U.S. L.W. 4745-46. The broad power of the Tribe to exclude non-members, another basis of controversy claimed by California, has also been repeatedly reaffirmed in the intervening years. Mescalero, supra, at 51 U.S.L.W. 4743; Montana, supra; Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982). There may be very little legal basis for disagreement between the parties at this point. If there is no live controversy on the merits, the procedural and immunity questions become irrelevant, and need not be determined.

Besides the legal changes, there have also been numerous changes in political administration at Quechan, since Tribal Council elections are held every two years, and elections for Tribal President and Vice-President are held every four years. Quechan Tribal Constitution, Article III (Appendix to App.Br.). The terms of the Council members who allegedly expressed the belief sometime in 1976 that the Tribe had exclusive jurisdiction to regulate the taking of fish and game by non-Indians have long expired; there is no indication in the record of the position of subsequent tribal administrators. As this Court has pointed out, "past exposure to illegal conduct does not in itself show a present case or controversy ... if unaccompanied by any continuing, present adverse effects." O'Shea v. Littleton, 414 U.S. 488, 495-6 (1974).

Without further trial court proceedings, it is not possible to say with certainty whether any substantive issues or disputes between the parties still exist, after the various legal and political changes. It is clear, however, that Supreme Court

review of ancillary issues would only serve to further prolong the litigation. Since the stale and outdated allegations of California's complaint furnish no present basis for suit, review should be denied on that basis alone.

II. CALIFORNIA'S CLAIMED RELIANCE ON CONSTITUTIONAL VIOLATIONS BY TRIBAL OFFICERS IGNORES ITS OWN DISCLAIMER

Judge Norris states in his dissenting opinion, Pet. for Cert. A-8 through A-23, that California "rests its complaint" upon allegations that Quechan's officers were carrying out their duty in violation of the Constitution, and bases his dissent primarily on the concept that this case falls under what he calls "the second branch of Ex parte Young." Id. at A-11. The state now eagerly adopts this analysis as well, Pet. for Cert. at 7, n. 5; 15-17, while ignoring both its own express disclaimer of such a basis for decision before the Court of Appeals, Cal.Br. at 12, n. 10 ("It is not necessary to reach this question here"), and its failure to make any such allegations before the district court. Complaint, paragraph 7.

The issue of whether an assertion of tribal authority is unconstitutional (instead of or in addition to being ultra vires an officer's powers) was never presented to, briefed, or argued before either the trial court or the Court of Appeals. App.Br. at 26, n. 21. As Judge Norris correctly points out, the legal analysis of a case of alleged unconstitutional (as opposed to merely ultra vires) conduct proceeds along markedly different lines from those briefed and argued here. Pet. for Cert. at A-11, n. 1. Again, California seeks to transform the case before this Court into something it is not. Had it alleged the unconstitutionality of Quechan's officers' actions in its pleadings before the trial court, the parties could have developed the necessary factual and legal background on which meaningful appellate review depends, rather than raising new issues in a factual vacuum. Having made the choice not to allege or argue possible constitutional matters below, California cannot now raise the issue, through the bootstrap of a dissenting opinion, before this Court.

III. PETITIONER MISAPPREHENDS THE NATURE OF SUITS AGAINST OFFICERS IN THEIR INDIVIDUAL CAPACITIES

A major issue in this case has been California's unwillingness to accept the long-sanctioned rule that suits against officers acting under color of law must be brought against them in their individual capacities, alleging that their actions exceeded their authority. Ex parte Young, 209 U.S. 123 (1908). Such a form of pleading avoids sovereign immunity bars through what may appear to be somewhat of a "legal fiction": that the officer, and not the sovereign, is the defendant. As Professor Davis has pointed out, the court in Young was aware that it was engaging in a "fiction" by holding that the suit was against Young as an individual instead of the state:

> ... the Court well knew that the Attorney General was still the Attorney General while he was enforcing the statute, and the Court well knew the effect of enjoining the Attorney General was to enjoin the state ...

Davis, K., Suing The Government By Falsely Pretending To Sue An Officer, 29 U.Chi.L.Rev. 436, 437 (1962). [Hereafter "Suing the Government".]

There are sound policy reasons for such a pleading convention. This "legal fiction" has been called "indispensable to the establishment of constitutional government and the rule of law." Perez v. Ledesma, 401 U.S. 82, 110 (1971) (separate opinion by J. Brennan), see also C. Wright, Handbook of the Law of Federal Courts 186 (2d ed. 1970). Part of the justification is the impressive body of precedent that has grown out of it, to which courts and litigants may look for guidance:

> ... [t]he false pretense made by the Court in Ex parte Young has been the mainstay in challenging governmental actions through suits for injunctions and declaratory judgments.

Suing the Government, at 437.

Petitioner does not suggest, nor does any sound basis exist, for overturning nearly a century of established precedent. At the pleading stage, it makes little practical difference to litigants. Petitioner's arguments that pleading in such a standard manner would not have provided adequate relief are incorrect as a matter of law.

A. Petitioner's Suit Survives Changes of Tribal Officers

The injustice of mooting a plaintiff's suit when a defendant public officer is replaced in office led to the adoption in 1961 of the current version of Federal Rule of Civil Procedure 25(d)(1). That subsection provides for automatic substitution of successor "public officers," a broad term intended to include the entire class of persons sued for actions arising from their public (as opposed to purely private) actions, with very limited exceptions.[3] Tribal officers have been deemed "public officers" for the purposes of the Rule. Sturdevant v. Deer, 73 F.R.D. 375, 379 (1976).

The scope of the Rule clearly extends to "Ex parte Young" type suits, without requiring resolu-

[3]The major exception would be where the case seeks money damages from the officers' personal assets. Advisory Committee's Note of 1961 to Subdivision (d). Similar provisions are found at Federal Rule of Appellate Procedure 43(c)(1) and Supreme Court Rule 40.3.

tion of possible sovereign immunity defenses. The Rule is procedural rather than substantive, recognizing that suits nominally against officers in their individual capacities may often require substitution when a new person takes office:

> The expression 'in his official capacity' is to be interpreted in its context as part of a simple procedural rule for substitution; care should be taken not to distort its meaning by mistaken analogies to the doctrine of sovereign immunity from suit or the Eleventh Amendment. The amended rule will apply to all actions brought by public officers for the government, and to any action brought in form against a named officer, but intrinsically against the government or the office or the incumbent thereof whoever he may be from time to time during the action. Thus the amended rule will apply to actions against officers to compel performance of official duties or to obtain judicial review of their orders. It will also apply to actions to prevent officers from acting in excess of their authority or under authority not validly confered, cf. Philadelphia Co. v. Stimson, 223 U.S. 605 (1912), or from enforcing unconstitutional enactments, cf. Ex parte Young, 209 U.S. 123 (1908); Ex parte La Prade, 289 U.S. 44 (1933). In general it will apply whenever effective relief would call for corrective behavior by the one then having official status and power, rather than one who has lost that status and power through ceasing to hold office.

Advisory Committee's Note to Subdivision (d) (1961).

The express intent of the Rule is to prevent the sort of problem over which California expresses concern at pages 13 and 19 of its Petition: that the Tribe could defeat the suit by electing new officers. As Professor Moore points out, the Rule:

> neither enlarges nor abridges the actions which can be brought by or against a governmental officer. It does not add to nor detract from the doctrine of sovereign immunity, nor does it allow an action against a state which is otherwise barred by the Eleventh Amendment. And as the above-quoted extract from the Advisory Committee's Note points out, the interpretation of 'official capacity' should not become beclouded with concepts that are appropriate to the doctrine of sovereign immunity or the Eleventh Amendment but are inappropriate to describe the functioning of Rule 25(d).

3B Moore's Federal Practice, Para. 25.09 (1982).

Thus, petitioner's major objection to suing the officers in the normal manner as "individual" defendants -- that the changing officeholders may make resolution on the merits impossible to obtain -- has been moot since 1961, when the Rule was amended to allow for automatic substitution. The defendants have been and will continue to be the

Tribe's current president, council members and game warden, whether sued as individuals or in their official capacities. Petitioner's concern that complying with normal pleading rules would somehow "change the gravamen of the state's entire claim," Pet. for Cert. at 16, illustrates a profound misunderstanding of the operation of Rule 25(d), which, without delving into the complexities of immunity law, provides a simple and effective procedural solution to petitioner's imagined problem.

B. California Fails To Articulate Any Reasonable Explanation Or Justification For Its Stubborn Failure To Follow Basic Pleading Rules

California's other expressed reason for refusing to bring its complaint in the normal fashion (by suing the tribal officers as individuals for their official actions) is that the alleged grievance arises from "official" rather than personal conduct. As discussed above, this is precisely the situation governed by Ex parte Young, which created what is essentially a legal fiction to avoid the absolute bar of sovereign immunity.

Merely suing officers as individuals for "official" acts does not, of course, automatically remove all sovereign immunity considerations in this case, as the Tribe pointed out in its argument before the Court of Appeals. It does, however, present the proper posture for the trial and appellate courts to consider the relevant issues, in accord with long-standing precedent. There was simply no valid reason for California to refuse to amend its complaint to come within the Ex parte Young pleading convention. That is the central holding of the Ninth Circuit decision: that California, like all other plaintiffs, must properly plead its cause of action under standard rules to allow consideration of the merits of its position, and that its failure to amend its complaint, despite the obviousness of the solution, transforms the controversy from one of substance to one of simple procedure. California continues to press potentially far-reaching substantive claims in a case where defendants have not even answered yet, and where the true issues have thus not yet been joined.

Such piecemeal appellate review is clearly disfavored. Goldstein v. Cox, 396 U.S. 471, 478 (1970); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 124 (1945):

> Since its establishment, it has been a marked characteristic of the Federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance.

Johnson, supra, at 124.

This case was barely begun when California chose to appeal rather than to amend its complaint. Many potentially determinative issues were never raised. Even if California had prevailed on the sovereign immunity question, that is merely a threshold issue in deciding the underlying lawsuit, the resolution of which may well trigger further appeals. Judicial economy requires that where a plaintiff can amend a complaint it should be done before appealing the procedural ruling; only when no possible amendment will cure the defect is there

an appealable issue.[4] Despite petitioner's arguments to the contrary both before this Court and the Court of Appeals,[5] it could have and should have amended its complaint, thus saving needless extra years of pointless litigation, of which it now complains. Pet. for Cert. at 6. At best, it could

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[4]See discussion of the appealability issue in Part IV, infra. Petitioner's other option was to stand on its original complaint, a course of action it at least arguably attempted in the Ninth Circuit and seems to continue to press here. Given its admission that its suit as pleaded is against the Tribe, and the controlling effect of People v. Quechan Tribe, 595 F.2d 1153 (9th Cir. 1979) which expressly forbade such a suit, that course of action would seem to be obviously futile, since California is precluded from relitigating the issue of jurisdiction over the Tribe. American Surety Co. v. Baldwin, 287 U.S. 156 (1932). What the state in reality is asking for is that its flawed complaint against the Tribe be construed as an Ex parte Young suit against the officers, a construction that the state's own admissions and arguments, as well as the allegations of its complaint, make impossible.

[5]Counsel for the state later retracted his mistaken assertion at oral argument before the Ninth Circuit that the trial court had denied leave to amend the complaint. Declaration of Roderick Walston in Response to Court's Order of November 18, 1981, at 1-2. Thus, petitioner's assertion that relief is unobtainable under any possible amendment, Pet. for Cert. at 6, n. 4, is once again simply incorrect.

have proceeded to the merits of its suit then; at worst, if the properly pleaded complaint were still held insufficient to overcome the immunity defense, there would have been a clear and properly framed appealable issue. Instead, California achieved neither.[6] Having shot itself in the foot, the state cannot now complain of the hole in its shoe.

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[6]Such actions, while puzzling from the normal litigation point of view, make more sense in light of the state's admission that it was attempting to set up a test case on sovereign immunity rather than resolving the alleged hunting and fishing controversy pleaded in its complaint, as discussed supra.

IV. CALIFORNIA'S OBJECTIONS TO THE APPLICATION OF THE FINAL JUDGMENT RULE ARE INSUBSTANTIAL BECAUSE OF ITS CLEAR OPPORTUNITY TO AMEND ITS COMPLAINT

A. The Final Judgment Rule Being Entirely Jurisdictional Cannot Be Applied With Reference To Its Effects On Individual Litigants

The "final judgment rule," 28 U.S.C. § 1291, limits appellate jurisdiction to the review of final decisions of the district courts. It is firmly rooted in American jurisprudence, traceable to the Judiciary Act of 1789.[7] The purpose of the finality rule is to guard against multiple appeals, prior to a full adjudication in the trial court, which could result in piecemeal litigation. Cobbledick v. United States, 309 U.S. 323 (1940),[8] Catlin v. United States, 324 U.S. 229 (1945).

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[7] Act of Sept. 24, 1789, 1 Stat. 73.

[8] The Court in Cobbledick elaborated that the rule was also intended to avoid harrassment and a possible succession of separate appeals that could "enfeeble judicial administration."

The district court neither rendered nor entered a final judgment under 28 U.S.C. § 1291 and Fed.R.Civ.P. 58. The Ninth Circuit found that appealability turns ultimately on finality, and that the preliminary dismissal of a complaint, without denying leave to amend, is not a final and appealable order. Since petitioners did not obtain a clear final order, it failed to perfect its appeal.

California is correct in noting that the final judgment rule has been liberally construed to allow review in special cases when certain factors are present.[9] However, petitioner is incorrect in suggesting that equitable considerations should govern that which is entirely a jurisdictional question. United States v. Anderson, 464 F.2d 1390,

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[9]Most notable among these are 28 U.S.C. § 1292, allowing appeal of certain interlocutory orders; the rule of Forgay v. Conrad, 47 U.S. (16 How.) 200 (1848) allowing immediate appeal of certain property transfer orders when only ministerial acts remain; and "special circumstances" allowing appeal when it is clear the action could not have been saved by any amendment of the complaint, Marshall v. Sawyer, 301 F.2d 639 (9th Cir. 1962).

1392 (D.C. Cir. 1972).

In the present case, the Court of Appeals determined that none of the special factors or circumstances allowing for immediate appeal existed, and properly dismissed the action. However unfortunate the effect on petitioner's case, the propriety of an appeal is an essential jurisdictional requirement all litigants must satisfy: "The considerations that determine finality are not abstractions but have reference to very real interests -- not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system." Republic Natural Gas Co. v. State of Oklahoma, 334 U.S. 62, 67 (1948). Professor Moore also recognizes that the rule should not be applied to fit the needs of individual litigants: "The prevention of useless expenditure is best served in most cases by overlooking the plight of particular litigants and maintaining the final judgment rule." 9 Moore's Federal Practice § 110.12, (1982).

Petitioner had other avenues open to it, in addition to amendment of its complaint, that could have cured its jurisdictional omissions.[10] It chose instead to ignore clear statutory and case authority in taking its appeal. California now attempts to remedy this jurisdictional deficiency through a writ of certiorari to this Court.

B. There Is Little Or No True Conflict Between The Courts Of Appeal

Although petitioner and its amici argue that a conflict exists in the courts of appeal on the issue of the appealability of an order dismissing the complaint but not the entire action, the conflict is more apparent than real. The Ninth Circuit's decision below, far from being a minority position, is in accord with rulings in virtually every circuit which has considered this question.

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[10] For example, petitioner could have requested the entry of a separate judgment document nunc pro tunc, or asked leave of court to supplement the record to include a separate judgment entered subsequent to the docketing. 6A Moore's Federal Practice § 58.08 (1982); FRAP 10(e).

Most importantly, however, this Court has also ruled that when a complaint may be amended, the judgment is not final. Jung v. K & D Mining Co., 356 U.S. 335 (1958). The Court held that the district court's order dismissing the complaint "left the suit pending for further proceedings either by amendment of the [complaint] or entry of a final judgment," id. at 336-337, citing Missouri & K.I.R. Co. v. Olathe, 222 U.S. 185 (1911).

Thus, the decision below simply follows the rule, enunciated by this Court and adhered to by the overwhelming majority of the Courts of Appeal, that preliminary dismissal of a complaint without denying leave to amend is not a final and appealable order. Borelli v. City of Reading, 532 F.2d 950 (3d Cir. 1976); Austracan, (U.S.A.) Inc., v. M/V Lemoncore, 500 F.2d 237 (5th Cir. 1974); Azar v. Conley, 480 F.2d 220 (6th Cir. 1973); Grantham v. McGraw Edison Co., 444 F.2d 210 (7th Cir. 1971); Local 179, United Textile Workers v. Federal Paper Stock Co., 461 F.2d 849 (8th Cir. 1972);

Sherr v. Sierra Trading Corporation, 492 F.2d 971 (10th Cir. 1974).

The Sixth Circuit's opinion in Azar v. Conley, supra, best illustrates the unanimity of the rule:

> There is a considerable body of case law, which appears to us to be well-founded, distinguishing between a judgment which dismisses the action and therefore is a final judgment and one that only dismisses the complaint without dismissing the action. The latter is not appealable if the complaint may be saved by amendment.

Id. at 223.

The apparent minority position of the Second Circuit is that unless express leave to amend is granted, the dismissal of the complaint operates to dismiss the entire action. Elfenbein v. Gulf & Western Industries, Inc., 590 F.2d 445 (2d Cir. 1978).[11] While this rule may have the benefit of simplicity, it ignores the reality that often courts

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[11] This view is based on the Second Circuit's position that the right to amend a complaint without leave of court terminates upon the granting of a motion to dismiss. Elfenbein at 448, ft. n. 1. Petitioner, however, brought its action within the Ninth Circuit where the free amendment right clearly remains. Richardson v. United States, 336 F.2d 265 (9th Cir. 1964).

do not expressly specify whether leave to amend is granted or denied. This is precisely what occurred in the instant action.

In the majority of cases an amendment to correct pleading and similar defects is possible, and leave to amend is assumed even if not expressly granted. Wright & Miller, Federal Practice and Procedure, Vol. 6 §§ 1473, 1483 (1976). Richardson v. United States, 336 F.2d 265 (9th Cir. 1964). In light of the mandated liberal application of Fed.R. Civ.P. 15, authorizing liberal amendment of pleadings, it would seem the better practice to assume a right to amend unless that right is specifically denied.

Despite the difference in language, the Second Circuit's holding can be reconciled by looking to the underlying rationale: that an appeal is proper only when proceedings are concluded in one way or another in the trial court. As explained above, petitioner had the option to amend its complaint to state an Ex parte Young theory. It

also had the option to stand on its complaint and request entry of final judgment on that basis. It did neither, leaving a jurisdictional vacuum that the Court of Appeals recognized as inadequate in that there was no final action to review.

C. The Court Of Appeals Was Not Bound By The Earlier Motions Panel Ruling

A basic principle of federal jurisdiction is that a court must consider its own power to hear a case, and cannot act beyond its appellate jurisdiction. Brown Shoe Co. v. United States, 370 U.S. 294, 305-306, (1962). Thus it was not improper for the Court of Appeals on its own motion, to review its jurisdiction to hear this case.

Petitioner states that it was entitled to rely on the appellate motion panel's earlier ruling denying appellees' motion to dismiss, and that the decision panel could not reconsider the issue. Such is not the case. In Green v. Department of Commerce, 618 F.2d 836 (D.C.Cir. 1980), an appellate motion panel had earlier refused to dismiss an appeal where the motion was brought on the basis

that it was not a final judgment. The decision panel subsequently reconsidered the issue on its own motion, and dismissed the appeal stating: "The earlier action of the motions panel does not free this Court from the independent duty to decide whether we have jurisdiction." Green, supra, at 839, n. 9; see also, United States v. Imperial Irrigation District, 559 F.2d 509, 520 (9th Cir. 1977); Russell v. Commissioner, 678 F.2d 782, 785 (9th Cir. 1982), [appellate courts have the power to reconsider issues previously decided.]

The power to reconsider a decision seems especially appropriate when the issue is as basic as a jurisdictional inquiry: "[T]he power [28 U.S.C. § 1291] belongs entirely to the courts of appeals, and it should be guarded with extreme care." 9 Moore's Federal Practice § 110.12 (1983). Since jurisdiction cannot be conferred by the parties,[12] a court must make certain that an

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[12] Brown Shoe Co. v. United States, 370 U.S. 294, 305 (1962).

appeal is properly before it. Thus, the Court in the present action necessarily reviewed its appellate jurisdiction, and, finding it lacking, properly dismissed the appeal.

V. TRIBAL SOVEREIGN IMMUNITY IS STILL VITAL TO THE PROPER FUNCTIONING OF INDIAN TRIBAL GOVERNMENTS

Petitioner and amici argue for a sweeping "re-examination" of the tribal immunity doctrine, maintaining that since tribes "stand on a lesser sovereign footing than the states" such an immunity is not legally or practically justified. Pet. for Cert., 19-20, Amici Brief at 13. Tribal sovereign immunity has stood since the early days of the Republic as a bulwark against outside incursions on tribal authority, and today, in an era of burgeoning litigation, is more crucial than ever for Indian governments. See Note, In Defense of Tribal Sovereign Immunity, 95 Harv. L.Rev. 1058 (1982).

As the author of the note points out, the doctrine is still needed to protect federal policies of

tribal self-determination, economic development, and cultural autonomy. Id. at 1058. Although many common law governmental immunities have been curtailed or abolished in recent years, this Court has consistently upheld the doctrine as applied to Indian tribes. See, e.g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58-59 (1978).

One important policy justification for such immunity is the need to protect scarce tribal assets, and to prevent diversion of governmental funds (both of the Tribe and the federal government, which financially supports most Tribal governments at least in part) from substantive programs to payment of money judgments and litigation expenses. While direct money damages are obviously the most threatening in this regard, the extremely high costs of litigation -- particularly appellate litigation -- make the defense of unconsented injunctive or declaratory relief suits financially burdensome as well. The sheer number of state amici warns of the amount of unconsented litigation tribes may expect if their immunity from

suit is abolished. That fragile immunity is, in many cases, Indian tribes' only shield against a plethora of suits from traditionally hostile state authorities.

In addition, the unrestrained availability of equitable suits, especially to challenge general assertions of authority rather than specific actions, offends the well-established rule that governments should be given the widest possible latitude in the conduct of their internal affairs, making even equitable suits in such areas often inappropriate. Rizzo v. Goode, 423 U.S. 362, 379 (1976). The tribal immunity doctrine advances the strong federal policies of tribal autonomy and self-determination, by helping to protect Indian tribes from such invasions of their governmental perogatives. The doctrine also protects cultural diversity, by refusing to force Indian governments to conform to non-Indian governmental norms, and minimizes the risk that a non-Indian reviewing court might misinterpret or ignore tribal laws, customs and traditions.

Any alteration to the tribal immunity doctrine should in any event come from Congress, not the judiciary. As Thebo v. Choctaw Tribe, 66 F. 371 (8th Cir. 1895), held many years ago:

> It may be conceded that it would be competent for Congress to authorize suit to be brought against the Choctaw Nation ... but no court has ever presumed to take jurisdiction of a cause against [Indian tribes] in the absence of an act of Congress expressly conferring the jurisdiction in the particular case.

Id. at 373-374.

Of course, as pointed out supra, this case is wholly inappropriate to decide questions of of sovereign immunity not passed upon by the Court of Appeals. In addition, though, federal law and policies indicate that judicial abrogation of the doctrine would be both unwarranted and unwise.

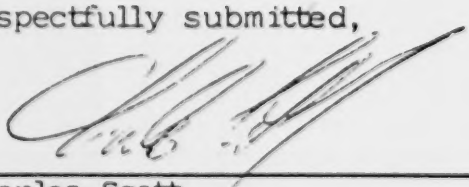
CONCLUSION

The Ninth Circuit neither considered nor decided any sovereign immunity issue, and for that reason the writ of certiorari as to sovereign immunity issues is inappropriate and should be denied. The remaining procedural ruling is correct, since it upholds principles of sound judicial management by mandating finality at the trial court level before an appeal will lie. No split in the Courts of Appeals exists as to the basic principle that finality is required to appeal, and whatever minor differences exist between the circuits in establishing that finality do not merit resolution by this Court.

For the above reasons, the writ should be wholly denied.

Dated: June 30, 1983

Respectfully submitted,



Charles Scott
Counsel of Record
Eugene Madrigal
Forest Wright
California Indian Legal Services

Attorney for Respondents

RECEIVED OCT 20 1980

STATE OF CALIFORNIA—RESOURCES AGENCY

EDMUND G. BROWN JR., Governor

DEPARTMENT OF FISH AND GAME
1416 NINTH STREET
SACRAMENTO, CALIFORNIA 95814
(916) 445-3531

October 15, 1980

Charles Scott
California Indian Legal Services
1860 South Escondido Boulevard
P.O. Box 2457
Escondido, CA 92025

Dear Mr. Scott:

In your letter of October 2, 1980, you suggested that representatives from the Quechan Indian Tribal Council and the Department of Fish and Game meet and discuss our cooperative working relationship on Reservation lands. We are always available and anxious to get together if it may help the wildlife resources in California and those who enjoy them.

I believe your reference to the "potentially violent situation existing between state and tribal fish and game officers" was in fact an earlier concern of ours but one that fortunately did not materialize. Both the Reservation officers and our state wardens have made a sincere effort to get along in a difficult situation.

Actually, the level of on site harmony between our officers is not an issue. Our primary objective and purpose for filing a motion with the court of appeals was to expedite the issue of California's right to sue tribal officers. We feel strongly that the court must litigate that issue soon.

With this in mind, I would be pleased to have appropriate numbers of my staff meet with Quechan Tribal Officers and discuss any aspect of our enforcement relationship on Reservation lands.

As you suggest, our respective attorneys could be present, however, it seems to me that our personnel might feel freer to discuss future work plans and leave the appeals issue to the courts, if our attorneys were not present.

Either Fred Worthley, Regional Manager for our southern region or Ned Dollahite, Chief of the Wildlife Protection Branch in Sacramento, would be capable representatives for this Department. Fred Worthley can be contacted at (213) 590-5177 and Ned Dollahite at (916) 445-5431.

E C Fullerton
Director